STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

vs **Docket No. 151342**

TIMOTHY MARCH,
Defendant-Appellant.

Lower Court No. 13-3955
Court of Appeals No. 317697

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to MCR 7.302(H)(1).

STATEMENT OF QUESTION PRESENTED

I.

The sheriff's sale purchaser of a home acquires equitable title to and a future interest in the real estate, including its fixtures, such that anyone—including the mortgagor-in-possession—who removes the fixtures and appropriates them to their own use is guilty of either larceny or embezzlement. After defendant's father had lost the property at a sheriff's sale to complainant John Hamood, defendant secretly removed and transported nearly every fixture to his own home. Was defendant properly charged with theft?

The trial court answered, “No.”

The Court of Appeals answered, “Yes.”

The People answer, “Yes.”

Defendant would answer, “No.”

STATEMENT OF FACTS

Defendant's father owned a house at 6090 Carlson in Westland, Michigan, over which he gave defendant power of attorney.[1] On August 9, 2012 the house was sold to complainant John Hamood at sheriff's sale after the mortgage was foreclosed upon. Sometime in February 2013, defendant removed from the house several kitchen cabinets, kitchen counter tops, the furnace, an exterior air conditioner unit, interior doors, bi-fold closet doors, a hot water tank, dish washer, refrigerator, and clothes washer and dryer. As a result, defendant was charged with larceny in a building and receiving and concealing stolen property worth between $200 and $1,000.

After waiving his preliminary examination, defendant moved in the trial court for dismissal, arguing that the property still belonged to him and his father and therefore couldn't have been the subject of their larceny.[2] The prosecution conceded that defendant still held legal title during the redemption period,[3] but maintained that Hamood had equitable title under MCL 600.3278—which prohibits the mortgagor or any other person liable on the mortgage from physically injuring the property during the redemption period—and therefore "owned" the property for purposes of the

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[1]Defendant waived his preliminary examination; thus, the historical (as opposed to procedural) facts are on information and belief.

[2]See 8.9.13 at 7-11.

[3]Id. at 11.

larceny statute (MCL 750.360).[4] Judge Jones rejected this claim and dismissed the charges.[5] The Court of Appeals reversed, and defendant applied for leave to appeal in this Court.

[4]Id. at 12.

[5]Id. at 13.

INTRODUCTION

When complainant John Hamood bought the house in question at a sheriff's sale, it contained kitchen cabinets, kitchen counter tops, a furnace, an exterior air conditioner unit, interior doors, bi-fold closet doors, a hot water tank, dish washer, refrigerator, and clothes washer and dryer. Legally speaking, when Hamood purchased the home, he became the owner of the entire estate, including its fixtures, subject only to the possibility that the former owners—defendant's family—would pay off the mortgage during the six-month redemption period and reclaim title. But instead of redeeming the house, defendant gutted it, taking not only the things that weren't nailed down, but even the things that were, including all of the aforementioned fixtures. In short, knowing that he had lost the house to Hamood, defendant stole everything he could from it.

Larceny consists of (1) the trespassory taking and (2) carrying away of the (3) personal property (4) of another with (5) intent to steal it. See *People v Cain*, 238 Mich App 95, 120 (1999). Here, on the date that Hamood bought the house in question, he came into constructive possession of it, including its fixtures. When defendant severed those fixtures they became personal property subject to being stolen. And when defendant carried away this personal property belonging to

Hamood, with felonious intent and against Hamood's will, defendant committed larceny.

Moreover, defendant's attempts to sidestep the consequences of his theft are unavailing. First, he did "trespass" against Hamood's property when he severed the fixtures from the real estate. That is, while defendant may have had temporary possession of the house and its contents, Hamood had constructive possession of it as of the date of sale. Defendant's act in removing the fixtures trespassed on Hamood's rights, just as an employee who takes his employer's money out of a cash register commits a trespass, even though the employee may have legal custody of the funds, because the employer retains constructive possession. Alternatively, defendant trespassed on Hamood's future interest in the fixtures, because "property rights" include the rights to possess, to enjoy, and to dispose of, and defendant did not have the right to dispose of the home's fixtures. When he did so, he trespassed on Hamood's future-interest property right in that regard.

And even if defendant did not, in fact, commit a trespass, all it means is that the correct crime to charge him with was embezzlement, not larceny. In other words, if defendant was in lawful possession of the fixtures and merely converted them to his own use, he is still guilty of theft, and the People will simply amend the Information to reflect defendant's embezzlement. "Embezzlement differs from

larceny precisely in this: that it does not depend upon a violation of possession." *US v United States Brokerage & Trading Co.*, 262 F 459 (CA DC, 1920).

Second, fixtures can, in fact, be subject to larceny once they are severed from the real estate. Once the cabinets, counter tops, furnace, air conditioner, doors, hot water tank, dish washer, refrigerator, and clothes washer and dryer were no longer attached to the house, they became personal property. And although the ancient common law required some length of time between the severance and the carrying away in order for larceny to be charged, the modern view is that such is not necessary. In any event, here the evidence is sufficient to show that defendant did sever the fixtures and take them out separately. Either way, once the fixtures were detached from the real estate, they became personal property subject to being stolen, which defendant then did.

Third, the severed fixtures were property "of another," namely complainant Hamood, when defendant took them. Although defendant may have had the right to use the fixtures during the redemption period, equitable title to them vested in Hamood on the date of the sheriff's sale. Defendant's temporary right to enjoy the fixtures did not allow him to permanently remove them from the house. And, as previously indicated, at the very least Hamood had a valid future interest in the fixtures which defendant violated.

Were defendant's conduct not criminally sanctioned, then any lessee of real property would have carte blanche to remove anything at all from the leased premises, on the theory that one cannot steal what they have been given possession of, even if that possession is temporary. To the contrary, there can be no doubt here that defendant took property that rightfully belonged to Hamood, and that he should be held criminally accountable for doing so.

ARGUMENT

I.

The sheriff's sale purchaser of a home acquires equitable title to and a future interest in the real estate, including its fixtures, such that anyone—including the mortgagor-in-possession—who removes the fixtures and appropriates them to their own use is guilty of either larceny or embezzlement. After defendant's father had lost the property at a sheriff's sale to complainant John Hamood, defendant secretly removed and transported nearly every fixture to his own home. Defendant is properly charged with theft.

Standard of Review:

Issues of statutory construction are reviewed de novo. *People v Williams*, 483 Mich 226, 231 (2009).

Discussion:

Because complainant's sheriff's sale purchase gave him ownership rights in the fixtures at issue, the law considers defendant's permanent removal of those items to be theft. Under the law, complainant Hamood had equitable title to and a future interest in the real estate that included its fixtures, and defendant intentionally and wrongfully deprived Hamood of his title and interest. As such, defendant was correctly charged with feloniously infringing on Hamood's property: that is, with larceny.

According to MCL 750.356, a person who "commits larceny" by stealing goods or chattels of another person is guilty of a felony or misdemeanor, depending primarily on the value of the things stolen. The statute does not define "larceny," and so relies on the common law definition: taking and carrying away the personal property of another with felonious intent and without the owner's consent. *People v Gimotty*, 216 Mich App 254, 257-58 (1996). Here, although defendant had possession of his father's house, he did not have the right to sever its fixtures, to carry them to his own house, or to hide them there. By illegally severing the fixtures, defendant turned them into personal property capable of being stolen. The theft was complete when defendant removed the property from the house. And his felonious intent was further demonstrated by his lies when questioned about the goods. Thus, defendant is properly charged with larceny.

A. Severing the fixtures from the house constituted a "trespass."

Defendant maintains that there was no taking—or "trespass" in the language of the common law—because he had lawful possession of the house to which the fixtures were attached. But the trespass occurred when he severed the fixtures without authority to do so. That is, while it is true that a trespass is necessary in a prosecution for larceny, the trespass can be constructive. In fact, the law is replete

with instances of larceny convictions being upheld where the items were not taken directly from their owner.

Typically, these situations involve servants, employees, and bailees, where the thief has been given temporary custody of chattel, but not actual "possession." Thus, according to the ALR Comment Note on *Larceny as affected by distinction between custody and possession*, "Where personal property belonging to the master or employer is feloniously converted by a servant or employee having at the time a mere custody of the property, as distinguished from the legal possession thereof, the offense is generally held to be larceny." See 125 ALR 367 (1940) and cases cited therein. Similarly, those who are temporarily entrusted with personal goods for particular purposes, such as for safekeeping or on loan, still commit larceny when they make off with those items, despite the fact that there was no technical trespass. Id.

Several cases exemplify this point. In *Minnesota v Cohen*, 263 NW 922 (MN, 1935), the owner of a fur coat took it to a furrier for repairs. The furrier brought it to the owner's house to try on, but the owner simply took the coat, shut the door, and thereafter refused to remit payment. The court held that the owner had committed larceny of the furrier's lien interest in the coat, even though ultimately the coat belonged to her and even though she had lawful custody of it at

the time. Similarly, in *Oregon v Lewis*, 433 P2d 617 (OR, 1967), the court ruled that a hotel guest was properly charged with the larceny of the room's television despite the fact that he had paid for and was thus lawfully occupying the room. Thus, larceny *can* be committed without the goods being taken directly from the rightful owner.

In this case, complainant Hamood obtained constructive possession of the house as of August 9, 2012 and so defendant's misappropriation of its fixtures was larceny. According to this court in *Gerasimos v Continental Bank*, 237 Mich 513 (1927), the foreclosure on a mortgage extinguishes it, and the sheriff's sale purchaser gets equitable title as of the date of sale. See also *Ruby & Associates v Shore Financial*, 276 Mich App 110 (2007). Moreover, the law considers a sheriff's sale buyer to be the actual and absolute owner of the subject property if the mortgagor fails to redeem it. *Wells Fargo v County Place*, 304 Mich App 582 (2014). Thus, in the *Wells Fargo* case, the purchasing bank owed condominium dues not from the date that the redemption period expired, but from the date of the sheriff's sale, even though the mortgagor retained physical possession during that time. *Id.* Here, at the very least, defendant trespassed on Hamood's constructive possession of the house by removing its fixtures. Arguably, defendant trespassed on Hamood's actual possession since the redemption option was never exercised.

Additionally, or at least alternatively, defendant trespassed on Hamood's future interest in the fixtures by removing them from the house. While the People again acknowledge defendant's possessory interest during the redemption period, the right to possess property does not automatically include the right to remove or dispose of things attached to it. See *Adams v Cleveland-Cliffs Iron*, 237 Mich App 51, 57 (1999). That is, (a) possessing, (b) enjoying, (c) disposing of, and (d) excluding others from property are all distinct "sticks" in the "bundle" of rights flowing from legal title to land. Thus, one can have the rights to possess, to enjoy, and to exclude others from real property without retaining the ability to dispose of it. *Id.* Further, the state may properly regulate these "fundamental uses or rights attendant to the land" by statute. *Risko v Grand Haven Charter Tp*, 284 Mich App 453, 463 (2009).

Here our Legislature has regulated the use and rights attendant to land by securing the rights of a sheriff's sale purchaser during the redemption period against injury to the property by the mortgagor:

> During the period of redemption following a foreclosure sale of property under this chapter, the mortgagor and any other person liable on the mortgage is liable to the purchaser at the sale, or the mortgagee, payee, or other holder of the obligation secured by the mortgage if the mortgagee, payee, or other holder takes or has taken title to the property at the sale either directly or indirectly, for any physical injury to the property beyond wear and tear resulting from the normal use of

> the property if the physical injury is caused by or at the direction of the mortgagor or other person liable on the mortgage.

MCL 600.3278(1). In other words, a sheriff's sale purchaser has the right to take over the bought property in the same condition in which it was sold, minus normal wear and tear during the redemption period. Thus, the purchaser has a future interest in the purchased property, contingent only on the possibility that the mortgagor will redeem it. Since defendant's family did not redeem the house, and since defendant did not obtain Hamood's permission to remove any fixtures, defendant's actions in severing the kitchen cabinets, kitchen counter tops, furnace, air conditioner, doors, hot water tank, dish washer, refrigerator, and clothes washer and dryer constituted a trespass to Hamood's future interest in obtaining those items as part of the house he bought.

This case illustrates why the Legislature passed MCL 600.3278(1): to stop people from substantially devaluing homes after they have been sold at a sheriff's sale. While defendant's statutory redemption right would have prevented Hamood from taking out all the appliances and furnishings from the house during the redemption period, MCL 600.3278 prevented defendant from doing the same. Defendant's actions therefore violated the larceny statute and he was properly charged.

Key to this analysis is the fact that, technically speaking, fixtures belong to the real estate they are attached to. According to this court in *Wayne County v Britton Trust*, 454 Mich 608 (1997), a fixture is anything that is (a) annexed to realty regardless how slight the attachment, (b) appropriate to being adapted to the realty, and (c) intended to be a permanent accessory to the realty. If something is a fixture, it goes with the real property and is actually considered to "belong to the leasehold." See *Wentworth v Process Installations, Inc*, 122 Mich App 452, 467 (1983). A home's kitchen cabinets, kitchen counter tops, furnace, air conditioner, doors, hot water tank, dish washer, refrigerator, and clothes washer and dryer are all annexed to the realty, appropriate to being adapted to the realty, and intended to be permanent accessories to the realty. When Hamood bought the house, he bought those fixtures. By severing them, defendant committed a trespass.

B. If severing the fixtures was not a trespass, then defendant committed embezzlement instead of larceny.

But even if defendant's possession of the fixtures defeats the element of trespass, he is still guilty of embezzlement, because the primary difference between larceny and embezzlement is the element of trespass. See 26 Am Jur 2d, *Embezzlement*. In particular, MCL 750.181(1) prohibits the embezzlement, fraudulent disposal of, or conversion by a person of *his own* property, if the property is also “partly the property of another person.” When Hamood purchased

the house, the fixtures were intact and were considered part of the real estate, just as much as the roof and walls. As shown below, defendant converted them to personal property when he severed them from the real estate. But that did not obliterate Hamood's interest in the now-personal property. If defendant could not commit larceny because at the time he took the fixtures he had the right to possess them, then at the very least he committed embezzlement.

C. The fixtures became personal property, capable of being stolen, when defendant severed them from the realty.

Defendant also maintains that fixtures attached to real property cannot be stolen, because larceny applies exclusively to personal goods or chattel. While this is true, it is beside the point: when fixtures are severed from real estate, they become personal property and are then subject to larceny or embezzlement. According to the ancient common law, real property could not be stolen because of its "permanent and stable nature." *Larceny of real property of things savoring of real property*, 131 ALR 146 (1941). Even the severing and carrying away of crops, trees, minerals, or fixtures was merely misdemeanor trespass rather than felony larceny. Id. Only if there was an interval between the severance and the carrying away would the crime be larceny. Id. Under that theory, the severance transformed the real property into chattel; to later pick it up and remove it was

therefore larceny. "Thus, in a perverse and unintended application of the work ethic, thieves industrious enough to harvest what they stole and to carry it away without pause were guilty at most of trespass, while those who tarried along the way, or enjoyed fruits gathered by the labor of others, faced the hangman's noose." *California v Dillon*, 668 P2d 697, 705 (Cal, 1983).

Recognizing this perversity in the law, many courts sought to limit its impact by allowing the delay between severance and removal to be very short, such that the rule itself eroded away over time. *Id.* at 707. Similarly, other courts creatively reconstructed the facts to establish a sufficient temporal gap. *Id.* (citing cases from Alabama, Maryland, and Pennsylvania). Other states redefined "fixtures" to make the theft thereof larceny rather than trespass, irrespective of any interval. *Id.* (citing cases from Mississippi, Kentucky, Nevada, Ohio, and Indiana). Many states judicially overruled the interval requirement altogether. *Id.* (citing cases from Nebraska, Oregon, Maine, Kentucky, Delaware, and Texas). Other states did so by statute. *Id.* (Mississippi, Tennessee, North Carolina, Georgia).

Today, it is the "generally accepted modern rule" that one who severs fixtures from realty and carries them away is guilty of larceny without regard for any break in the action. *Id.* (citing 50 Am Jur 2d, Larceny, section 73, p245). To that end, the Model Penal Code requires no time between the severance and the

taking away: the crime is always larceny. MPC § 223.0(6). Were the rule otherwise, given the mobility of modern homes, whole structures could be stolen. In *Floyd v Texas*, for instance, the court not surprisingly rejected the defendant's argument that—because of the subject property's nature as real estate—the house that he had removed from its original location to his own vacant land could not be considered stolen. *Floyd v Texas*, 296 SW 2d 523, 527 (1956).

Here, although it should not matter, there is evidence that defendant severed the fixtures and took them out on different days. To begin with, two neighbors told the police that defendant had been at his father's house several times in the weeks before he took the fixtures; during those times they heard loud noises like construction going on. Later they saw him moving things out into a box truck. The reasonable inference from this evidence is that defendant took several days to remove all the items, and then came back later to move them out. But even if this were not true, this court should adopt the modern rule and hold that no interval is required between the severance and the carrying away.

D. Although defendant was in legal possession of the house, he wasn't just "stealing from himself." Hamood had a legitimate ownership interest that defendant appropriated for himself.

Defendant's third demurrer is that he, not Hamood, was the owner of the property for purposes of larceny, and so could not have stolen from himself. But

again the law is against him. As indicated, *Gerasimos v Continental Bank* holds that the foreclosure of a mortgage extinguishes it, and the sheriff's sale purchaser then gets equitable title. 237 Mich 513 (1927). Just last year, our Court of Appeals confirmed that a sheriff's sale purchaser's deed is effective as of the purchase date, unless the mortgagor redeems the property. *Wells Fargo v County Place*, 304 Mich App 582 (2014). In other words, because the house was not redeemed, Hamood legally became its owner on August 9, 2012. If that is true, then clearly defendant was not the "owner" when he took the fixtures from the house after that date.

Moreover, this court has explicitly rejected defendant's "can't-steal-from-yourself" argument. In *People v Gregg*, 170 Mich 168 (1912), the defendant had given a promissory note to the complainant, and was slow in paying it off. The parties agreed that the complainant would return the note in exchange for several of the defendant's lambs. When the defendant not only refused to turn over the lambs, but denied having received the note back, he was charged with embezzlement of the note—at trial claiming that he couldn't "steal from himself." Affirming the conviction, this Court held that the note had been returned only *conditionally*, and that the title remained in the complainant until he had received his lambs. Likewise here, defendant held the house on the condition that he be

given time to redeem it, but title vested in Hamood unless his purchase price was refunded. See MCL 600.3240 (requiring a redeeming mortgagor to pay the sheriff's sale purchase price to the purchaser). Defendant did not take from himself; he stole from Hamood.

Furthermore, and as indicated above, at the very least defendant infringed on Hamood's future interest in the house by removing its fixtures. It was Hamood, not defendant, who owned the removed items as of, at the very latest, the expiration of the redemption period. Defendant had no right to interfere with that future interest. Doing so was an illegal theft of Hamood's personal property.

E. Defendant's alleged good faith is a matter for a jury, not this court, to decide; but that claim is meritless in any event, in light of defendant's lies when asked about the fixtures.

Defendant did not act in good faith; but even if he did that defense is premature. While it is true that a defendant's good-faith belief that he has a right to the allegedly stolen goods is a defense to larceny charges, the question whether that was the defendant's true motivation is one for a jury, not a judge. *People v Cain*, 238 Mich 95, 118-19 (2000). Here, however, defendant's lies when questioned about the fixtures almost certainly disprove any feigned innocence. That is, when the police came to defendant's home in Ecorse looking for the fixtures taken out of

Hamood's purchased house in Westland, defendant denied any involvement in removing them and maintained that he had bought the suspect items on craigslist. But it turned out that the kitchen cabinets, kitchen counter tops, furnace, air conditioner, doors, hot water tank, dish washer, refrigerator, and clothes washer and dryer scattered about inside defendant's Ecorse home *were* the ones from Hamood's property in Westland.

In a similar case in which the larceny defendant maintained a good-faith defense—he had sold a buggy and then took it back, claiming he thought he had re-purchased it—this Court upheld his larceny conviction largely because he accomplished the re-taking in secret. See *People v Long*, 50 Mich 249 (1883). Having waived his preliminary examination, defendant is nowise entitled to a finding at this stage of the proceedings that his removal of Hamood's fixtures was in good faith.

F. If defendant cannot be charged with larceny or embezzlement, at the very least he is guilty of malicious destruction of real property.

At the very least, one thing is certain: defendant injured the property that Hamood bought at the sheriff's sale. Even if he cannot be prosecuted for larceny or embezzlement of the property's fixtures, he can be charged with maliciously

destroying the real estate. According to MCL 750.380, "A person shall not willfully and maliciously destroy or injure another person's house, barn, or other building or its appurtenances." In *People v Burkhardt*, this court held that the defendant was guilty of maliciously destroying real estate when he removed lead pipes and faucets from a house. *People v Burkhardt*, 72 Mich 172 (1888). Similarly, defendant committed malicious destruction of real property when he gutted the home that Hamood had purchased at sheriff's sale. If this court upholds the dismissal of theft charges, the People intend to initiate prosecution under MCL 750.380.

RELIEF

THEREFORE, the People request this Honorable Court to deny leave to appeal.

Respectfully submitted,

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